

Date of decision: 19.1.1996

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Mr. I.S. Supehia for the petitioner
Mr. J.D.Ajmera for the respondents.

Coram: S. K. KESHOTE, J

C.A.V. JUDGMENT:

Rule. Mr. J.D.Ajmera waives service of rule on behalf of the respondents.

2. In the writ petition the petitioners are not properly stated. Haji Ahmed Abdul Karim Fulwadi, petitioner No.1 is not a legal entity, and in the capacity of the President of the trust he could not have filed the writ petition. It is the trust, namely, Juma Masjid Trust Board, Jamnagar, who could have filed this writ petition and not by the President. It should have been the petition by the Trust, though through its President or other trustees. Petitioner No.2 is principal of a school run by the trust. I do not consider it to be a fit case where the petition should be dismissed on this ground, but treating it to be a petition filed on behalf of the trust I decide this case on merits.

3. The trust runs three educational institutions, namely, Juma Masjid Prathemic Kanya Shala, Juma Masjid Primary School and Juma Masjid Secondary School. The trust, by this writ petition, has challenged the order dated 23rd November, 1993 of the Assistant Provident Fund Commissioner, Ahmedabad, under section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952(hereinafter referred to as 'the 1952 Act'). The next challenge of the trust in the writ petition is to the show cause notice which has been issued by the said authority to the petitioner. Under the aforesaid show cause notice the petitioner was required to appear before the said authority on 28th March, 1995 in connection with recovery of the amount of provident fund as determined under section 7-A of the 1952 Act, vide order annexure-A.

4. Learned counsel for the petitioner has challenged both the orders on the ground that without giving notice or opportunity of hearing respondent No.1 has passed the aforesaid order. Under the first order, liability of Rs.1,64,196/- was determined against the trust as employer's share for the period from August 1982 to February 1989, and by the second show cause notice the authority now wants to arrest the trustees of the Trust. It has next been contended that even otherwise, on merits the order dated 23rd November, 1993 is not sustainable. Respondent No.1 has committed serious illegality in clubbing the two institutions for the purpose of applicability of the provisions of the 1952 Act. Learned counsel for the petitioner contended that there are two educational institutions - Primary School for the Girls and Primary School for the boys which are two separate distinct establishments. Both the institutions are separately registered and are being granted separate grants by the Education Department of the State of Gujarat. The

institutions have separate staff. Both the institutions are situated at different places. Merely because both the institutions are run by one trust, they could not have been clubbed together. Their salary registers are separately maintained. Their audit reports are separately done. It has lastly been contended that though in the year 1982 the strength of employees of the two institutions was more than 20, but for last more than seven years the total strength of employees in the two institutions is less than 20 and as such on this ground also respondent No.1 has committed serious illegality in bringing the institutions within the purview of the 1952 Act.

5. Learned counsel for the respondents on the other hand contended that sufficient opportunity has been afforded to the petitioner Trust before passing the order under section 7-A of the 1952 Act, but the petitioners themselves have not availed of that opportunity. Mr. Ajmera further contended that in such cases where despite notice the petitioner has neglected to appear before the authority, no relief can be granted by this Court to the trust. He further contended that the day on which the 1952 Act has been made applicable to the educational institutions, admittedly the total strength of the employees was more than 20 and as such the 1952 Act is applicable to the institutions. It has next been contended that even at the subsequent stage if the employees' strength has been reduced to less than 20, then also it has no relevance whatsoever because once the Act becomes applicable, the institutions continue to be covered by the Act. It is a beneficial legislation which has been enacted for the benefit of the employees and the institutions cannot be permitted to take out the benefit of the Act once it becomes applicable to the employees by reducing the strength of the employees.

6. Referring to section 2-A of the 1952 Act Mr. Ajmera contended that it is a declaratory provision which lays down that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as part of the same establishment. Relying on the decision of the Supreme Court in the case of Union of India vs. Ogale Glass Works, (1971) 2 SCC 678, Mr. Ajmera contended that the insertion of section 2-A clarifies the position that the Act applies to composite factories (here establishments) and does not mean that before its insertion the position was somewhat different.

7. I have given my thoughtful consideration to the submissions of the learned counsel for the parties. Section 7-A of the 1952 Act provides that the officers of the rank

enumerated therein may, by order, in a case where a dispute arises regarding the applicability of the Act to an establishment, decide such dispute; and determine the amount due from any employer under any provisions of the Act, the Scheme or the Family Pension Scheme or the Insurance Scheme, as the case may be, and for any of the said aforesaid purposes may conduct such inquiry as he may deem necessary. Sub-section (3) of section 7-A provides that no order shall be made under sub-section(1), unless the employer concerned is given a reasonable opportunity of representing his case. Sub-section (4) of section 7-A provides for setting aside such order passed against an employer under sub-section(1) of the said section, in case the employer applies within three months from the date of communication of such order, and satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held.

8. From the reading of the averments made in para 6 of the petition as well as annexure-A it cannot be said that notice was not given to the petitioner trust. In para 6 the petitioner made categorical admission that letter dated 29th November 1991 was received. It was one of the notices which was sent to the petitioner by respondent No.1. From reading of the order dated 23rd November, 1993 it gives out that the petitioner has been sent more than a dozen notices, but it has neglected to appear before the authority personally. In view of this admission of the petitioner as well as the finding which has been recorded by respondent No.1, I do not find any substance in the contention of the petitioner that the order dated 23rd November, 1993 has been passed without affording any opportunity of hearing to the trust.

9. The matter does not rest here. The petitioner may not have appeared in person, but by sending two letters dated 21-8-1991 and 18-12-1991 it has raised objection that the institution has employed less than 20 employees and as such it was not amenable to the provisions of the 1952 Act. The institution has contested the applicability of the Act on the ground of employees' strength. Respondent No.1 in its order dated 23rd October, 1993 has noticed these two letters and the petitioner's contention has been accepted partly in relation to secondary section of the institution, and it was not brought within the purview of the 1952 Act as the employees working therein were getting the benefit of General Provident Fund Scheme. Clause (a) of sub-section (1) of section 7-A of the 1952 Act provides that where a dispute arises regarding the applicability of the Act to an establishment, it has to be decided by the authority. In the order dated 23rd November, 1993 respondent No.1 has expressly noticed this dispute raised by the institution and

it has also formulated point for consideration on this dispute. However, while passing the final order it has not recorded any finding on this dispute of the employees' strength in the establishment. The finding has been recorded only on the first point regarding whether the 1952 Act applies on the educational institutions or not, and after holding that the Act applies to the educational institutions the authority has concluded that the Department is right in covering the institution under the 1952 Act. When very specific objection has been raised and when serious dispute has been raised regarding applicability of the Act to the institutions run by the Trust, respondent No.1 has to decide that point and has to give out finding with reasons as to why the dispute raised is not acceptable. This has not been done. Though the learned counsel for the petitioner has raised many other contentions, I do not consider it necessary to advert to all these contentions as the illegality which has been committed and as noticed above is sufficient for acceptance of this writ petition.

10. In the result this writ petition is allowed, and the order dated 23rd November, 1993 produced at annexure-A to the petition is quashed and set aside. Respondent No.1 is directed to decide the matter afresh after giving full opportunity of hearing to the Trust. As the matter is pending since long, respondent No.1 need not send any notice to the Trust. The Trust is directed to represent through its representative and remain personally present before the Assistant Commissioner of Provident Fund on 5th February, 1996. It shall be open to respondent No.1 to pass order afresh in accordance with law. As annexure -B is a consequential action of order dated 23rd November, 1993, which order has been quashed and set aside by this Court, the show cause notice also has to be quashed and set aside and accordingly quashed and set aside. Rule made absolute in the aforesaid terms, with no order as to costs.

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